

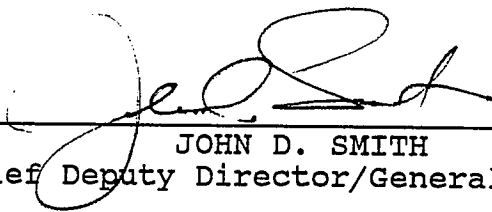
working

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW ENDORSED FILED
IN THE OFFICE OF
SACRAMENTO, CALIFORNIA

MAY 18 4 58 PM 1989

In re:)
Request for Regulatory) 1989 OAL Determination No. 88-011
Determination filed by)
Douglas E. Hines concern-) [Docket No. 88-011]
ing section 2708 ("Person-)
al Grooming Standards --)
Peace Officer and Fire)
Fighter Personnel") of the)
Department of Corrections')
Administrative Manual ¹)
_____)
Determination Pursuant to
Government Code Section
11347.5; Title 1, California
Code of Regulations,
Chapter 1, Article 2

Determination by:


JOHN D. SMITH
Chief Deputy Director/General Counsel

Herbert F. Bolz, Coordinating Attorney
Debra M. Cornez, Staff Counsel
Rulemaking and Regulatory
Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law is whether the Department of Corrections' "Administrative Manual," section 2708, which sets grooming standards for departmental peace officer and fire fighter personnel, is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law concludes that the above-noted "grooming standard" section is a "regulation," but is nonetheless exempt from the procedural requirements of the Administrative Procedure Act because it relates solely to the internal management of the Department of Corrections.

7

THE ISSUE PRESENTED ²

The Office of Administrative Law ("OAL") has been requested to determine³ whether the Department of Corrections' ("Department") Administrative Manual, section 2708, which sets grooming standards for departmental peace officers and fire fighters, is (1) a "regulation" as defined in Government Code section 11342, subdivision (b), (2) required to be adopted pursuant to the Administrative Procedure Act ("APA"), and (3) therefore violates Government Code section 11347.5, subdivision (a).⁴

THE DECISION ^{5,6,7,8}

OAL concludes that the above-referenced "grooming standard" section is a "regulation" as defined in the APA, but is not subject to the requirements of the APA⁹ because the challenged section comes within the internal management exemption contained in Government Code section 11342, subdivision (b).

I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

California's first, and for many years only, prison was located in the San Francisco Bay Area at San Quentin. As the decades passed, additional institutions were established, leading to an increased need for uniform statewide rules. Ending a long period of decentralized prison administration, the Legislature created the California Department of Corrections in 1944.¹⁰ The Legislature has entrusted the Director of Corrections with a "difficult and sensitive job",¹¹ namely:

"[t]he supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein" ¹²

Authority ¹³

Penal Code section 5058, subdivision (a), provides in part:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. . . ." [Emphasis added.]

Applicability of the APA to Agency's Quasi-Legislative Enactments

Penal Code section 5058, subdivision (a), provides in part:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. The rules and regulations shall be promulgated and filed pursuant to [the APA]" [Emphasis added.]

In any event, the APA applies to all state agencies, except those "in the judicial or legislative departments."¹⁴ Since the Department is in neither the judicial nor the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Department.¹⁵

General Background

To facilitate understanding of the issues presented in this Request, we will discuss pertinent statutory, regulatory and case law history, as well as the undisputed facts and circumstances that have given rise to the present Determination.

Background: The Department's Three Tier Regulatory Scheme

The Department of Corrections was traditionally considered exempt from codifying any of its rules and regulations in the California Code of Regulations (CCR). Dramatic changes to this policy have occurred in the past 15 years, in part reflecting a broader trend in which legislative bodies have addressed "deep seated problems of agency accountability and responsiveness"¹⁶ by generally requiring administrative agencies to follow certain procedures, notably public notice and hearing, prior to adopting administrative regulations. "The procedural requirements of the APA," the California Court of Appeal has pointed out, "are designed to promote fulfillment of its dual objectives--meaningful public participation and effective judicial review."¹⁷ Some legislatively mandated requirements reflect a concern that regulatory enactments be supported by a complete rulemaking record, and thus be more likely to withstand judicial scrutiny.¹⁸

The Department has for many years used a three-tier regulatory scheme to carry out its duties under the California Penal Code. The first tier consists of the "Director's Rules," a relatively brief collection of statewide "general principles," which were adopted pursuant to the APA and are currently contained in about 200 CCR pages.

The second tier consists of the "family of manuals," a group of six "procedural" manuals containing additional statewide rules supplementing the Director's Rules.¹⁹ The manuals are the Classification Manual, the Departmental Administrative Manual, the Business Administration Manual, the Narcotic Out-patient Program Manual, the Parole Procedures Manual-Felon, and the Case Records Manual. Manuals are updated by "Administrative Bulletins," which typically include replacement pages for modified manual provisions. In this determination proceeding, a section of the Departmental Administrative Manual ("DAM") is at issue.

Court decisions have struck down portions of the second tier--the Classification Manual²⁰ and parts of the Administrative Manual²¹--for failure to comply with APA requirements.²² OAL regulatory determinations have found the Classification Manual,²³ several portions of the Administrative Manual,²⁴ and two sections and several chapters of the Case Records Manual²⁵ to violate Government Code section 11347.5.

The third tier of the regulatory scheme consists of hundreds (perhaps thousands) of "operations plans," drafted by individual wardens and superintendents and approved by the Director.²⁶ These plans often repeat parts of statutes, Director's Rules, and procedural manuals.²⁷

Background: This Request for Determination

On April 17, 1987, the Department submitted to OAL a request to repeal section 3393 of Title 15 of the CCR. Section 3393 governed the wearing of uniforms, badges, and insignia by departmental employees. It also contained grooming standards of all "custody personnel." Among other things, section 3393 permitted male employees to have beards and any length of hair. The Department submitted the filing pursuant to Title 1, CCR, section 100, as a request for "change without regulatory effect." Section 100 allows an agency to make a nonsubstantive change to its regulations if the change would have no "regulatory" effect on those subject to the regulation. Such changes occur without publication of a notice or public participation.

On May 14, 1987, OAL disapproved the request for change without regulatory effect because OAL found that the Department was

"proposing to repeal certain rights currently exercised by employees and enjoyed by inmates and the general public, [and therefore] OAL believes that the repeal of section 3393 would indeed have regulatory effect."²⁸
[Emphasis added.]

OAL thus concluded that before the Department could repeal section 3393, it must first comply with the procedural requirements of article 5 of the APA (commencing with section 11346 of the Government Code).

After public notice and comment, the Department submitted a regulatory action concerning section 3393 to OAL on January 15, 1988, amending requirements for uniforms, badges and identification nameplates for peace officers; and deleting grooming standards, considered by the Department to be nonregulatory and a matter of internal management. OAL approved this regulatory action on February 16, 1988.

In a memorandum dated May 23, 1988, the Department issued a revision of Chapter 2700, including section 2708, of the Administrative Manual. Section 2708 was revised to add, among other things, grooming standards for male employees. These grooming standards prohibit hair length that extends below the top of the shirt collar, and beards, absent a medically verified skin irritation or disorder.

The Requester, Douglas E. Hines (a correctional officer), submitted a Request for Determination to OAL on July 20, 1988, alleging that revised Administrative Manual section 2708, titled "Personal Grooming Standards - Peace Officer and Fire Fighter Personnel," is a "regulation" as defined in Government Code section 11342, subdivision (b), and is in violation of Government Code section 11347.5.

On February 24, 1989, OAL published a summary of this Request for Determination in the California Regulatory Notice Register, along with a notice inviting public comment.²⁹

On April 10, 1989, the Department filed a Response to the Request with OAL. The Department summarized its position regarding the Request as follows:

" . . . The Department denies that DAM Section 2708 needs to be adopted pursuant to the APA, since it falls within the 'internal management' exception to the definition of 'a regulation.'"

In its Response, the Department also argued that

"[t]he Requestor is an officer in a well organized union, C.C.P.O.A. [California Correctional Peace Officers Association]; therefore, this situation lacks a disadvantaged or disabled group which needs a court's special protection. In fact, the Requestor and this labor union has [sic] available a multi-level grievance process, collective bargaining, as well as an opportunity to comment on the Department's amendment to 15 CCR 3393. These processes, not a Request for Determination, satisfy the principle of judicial economy since they are more efficient mechanisms for challenging DAM Section 2708."

We do not agree with the Department on this point. Title 1, CCR, section 121, subsection (b) defines "Request for determination," as a "request made by any person to [OAL], in accordance with the procedures specified in this article . . . as to whether a state agency rule is a regulation as defined in Government Code Section 11342(b)." (Emphasis added.) There is no additional requirement that the person be a member of a "disadvantaged or disabled group which needs a court's special protection," or that the person lack other means of recourse, or that the person seek the most "efficient" mechanism, in order to file a Request for Determination.³⁰

II. DISPOSITIVE ISSUES

There are two main issues before us:³¹

- (1) WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (2) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b) defines "regulation" as:

" . . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . . " [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . which is a [']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]" [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b) involves a two-part inquiry:

First, is the informal rule either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

Second, has the informal rule been adopted by the agency to either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

The answer to the first part of the inquiry is "yes."

For an agency rule to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.³² The challenged section applies

not only to correctional officers employed at San Quentin State Prison, but to all departmental peace officers and fire fighters statewide. Administrative Manual section 2708 states "The following minimum guidelines are adopted for all peace officers and fire fighters."

The answer to the second part of the inquiry is also "yes." The rule implements, interprets or makes specific Penal Code section 5058 which states in part that "The director may prescribe and amend rules and regulations for the administration of the prisons" [Emphasis added.]

WE THEREFORE CONCLUDE THAT ADMINISTRATIVE MANUAL SECTION 2708 IS A "REGULATION."

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies are not subject to the procedural requirements of the APA.³³

Government Code section 11342, subdivision (b)'s definition of "regulation" contains the following specific exception to APA requirements:

"'Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one which relates only to the internal management of the state agency" [Emphasis added.]

The internal management exception has been judicially determined to be narrow in scope.³⁴ A brief review of relevant case law demonstrates that the "internal management" exception applies if the "regulation" at issue (1) affects only the employees of the issuing agency,³⁵ and (2) does not address a matter of serious consequence involving an important public interest.³⁶

In Poschman v. Dumke³⁷, the court held that a Board of Trustees of California State Colleges rule dealing with tenure was not exempt from the APA because

"Tenure within any school system is a matter of serious consequence involving an important public interest. The consequences are not solely confined to school administration or affect only the academic community."³⁸ [Emphasis added.]

In Armistead v. State Personnel Board,³⁹ the California Supreme Court held that a State Personnel Board rule limiting

the withdrawal of resignations by state employees was a "regulation" and subject to the APA. The Court rejected the State Personnel Board's argument that the rule was exempt from the APA as internal management because, the court stated,

"[the rule] is designed for use by personnel officers . . . in the various state agencies throughout the state. . . . It concerns . . . a matter of import to all state civil service employees. . . ."40 [Emphasis added.]

Ligon v. State Personnel Board⁴¹ dealt with a State Personnel Board memorandum which detailed the procedures and standards by which other state agencies could consider an employee's "out of class" experience for purposes of advancement and promotion within the other agencies. The court's holding that the memorandum constituted a "regulation" was based on the implicit recognition that the challenged policy affected employees throughout the state system.

In Stoneham v. Rushen,⁴² the Court held that the Department of Correction's issuance of "administrative bulletins" implementing a standardized classification and transfer system for prisoners did not constitute "internal management" because the scheme extended

" . . . well beyond matters relating solely to the management of the internal affairs of the agency itself. Embodying as it does a rule of general application significantly affecting the male prison population in the custody of the Department, such a comprehensive classification system is not exempt as a rule of internal management from mandatory compliance with the Act [APA]."⁴³ [Emphasis added.]

Determining whether the challenged section comes within the "internal management" exception involves a two-part inquiry:

FIRST, DOES THE CHALLENGED RULE AFFECT ONLY THE EMPLOYEES OF THE ISSUING AGENCY?

SECOND, DOES THE CHALLENGED RULE ADDRESS A MATTER OF SERIOUS CONSEQUENCE INVOLVING AN IMPORTANT PUBLIC INTEREST?

The answer to the first part of the inquiry is "yes". The challenged section affects only Department of Corrections' employees; no other agency's employees are bound by the grooming standards set forth in the section.

The answer to the second part of the inquiry is "no." The grooming standards, e.g., length and style of hair, facial

hair, fingernails, cosmetics, jewelry and watches, do not involve a matter of serious consequence involving an important public interest.

The following are examples of "challenged rules" that have been found to involve a matter of serious consequence involving an important public interest.

The court in Poschman v. Dumke,⁴⁴ found that "Tenure within any school system is a matter of serious consequence involving an important public interest."⁴⁵

In 1988 OAL Determination No. 3,⁴⁶ we explored the issue of whether the State Board of Control's (Board) policy requiring psychotherapy expenses claimed at certain hourly rates to be reviewed by the Board prior to reimbursement of victims of crime under the Victims of Crime Act, was a "regulation." In that Determination, one factor that clearly substantiated the existence of an "important public interest" was the Legislature's express statement of intent:

"The Legislature has clearly stated [in Government Code section 13959] that there is a public interest in assisting Californians in 'obtaining restitution for the pecuniary losses they suffer as a direct result of criminal acts.'"⁴⁷ [Emphasis added.]

In 1988 OAL Determination No. 6,⁴⁸ we found that Chapter 7300 of the Department's Administrative Manual, which governs inmate/parolee grievance procedures, involved a significant public interest. The nature of the public interest involved was reflected in sections 7300 and 7301 of the Manual and was summarized in the Determination as "The need to resolve inmate grievances quickly and fairly within the prison system, thus making it unnecessary to expend significant resources litigating such matters in state or federal court." (Emphasis added.)

In contrast, the grooming standards set forth in Administrative Manual section 2708 do not significantly affect either the general "prison population"⁴⁹ or any segment of the general public. Similarly, in a prior Determination,⁵⁰ OAL found that an attendance policy, setting forth the time frame in which an employee must call in sick to a supervisor, did not significantly affect the general prison population or the general public.

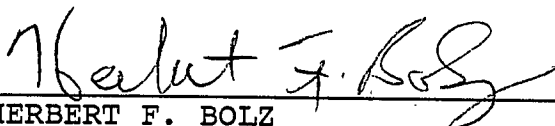
Additionally, there is no legislative statement declaring that a public interest exists in the personal appearance of an employee of the Department. We therefore conclude, in agreement with the Department, that the grooming standards at issue simply do not constitute a "matter of serious consequence involving an important public interest."⁵¹ (Emphasis added.)


Furthermore, in reaching the conclusion that grooming standards are not a matter of serious consequence involving an important public interest, we did not address the issue of whether the regulation of grooming standards for departmental peace officers and fire fighters' is constitutional, an issue that is beyond the scope of our review under Government Code section 11347.5.⁵²

III. CONCLUSION

For the reasons set forth above, OAL finds that Administrative Manual section 2708, concerning grooming standards for departmental peace officers and fire fighters, is a "regulation," but is nonetheless exempt from the provisions of the APA because it relates solely to the "internal management" of the Department.

DATE: May 18, 1989


HERBERT F. BOLZ
Coordinating Attorney


DEBRA M. CORNEZ
Staff Counsel

Rulemaking and Regulatory
Determinations Unit⁵³
Office of Administrative Law
555 Capitol Mall, Suite 1290
Sacramento, California 95814
(916) 323-6225, ATSS 8-473-6225
Telecopier No. (916) 323-6826

f:\ldet\89.9

- 1 This Request for Determination was filed by Douglas E. Hines. The Department of Corrections was represented by Marc D. Remis, Staff Counsel, Legal Affairs Division, P. O. Box 942883, Sacramento, CA 94283-0001, (916) 443-0495.

To facilitate indexing and compilation of determinations, OAL began as of January 1, 1989 assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination is "307" rather than "1."

- 2 The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4. Since April 1986, the following published cases have come to our attention:

Americana Termite Company, Inc. v. Structural Pest Control Board (1988) 199 Cal.App.3d 228, 244 Cal.Rptr. 693 (court found--without reference to any of the pertinent case law precedents--that the Structural Pest Control Board's licensee auditing selection procedures came within the internal management exception to the APA because they were "merely an internal enforcement and selection mechanism"); Association for Retarded Citizens --California v. Department of Developmental Services (1985) 38 Cal.3d 384, 396, n. 5, 211 Cal.Rptr. 758, 764, n. 5 (court avoided the issue of whether a DDS directive was an underground regulation, deciding instead that the directive presented "authority" and "consistency" problems); Boreta Enterprises, Inc. v. Department of Alcohol Beverage Control (1970) 2 Cal.3d 85, 107, 84 Cal.Rptr. 113, 128 (where agency had failed to follow APA in adopting policy statement banning licensees from employing topless waitresses, court declined to "pronounce a rule in an area in which the Department itself is reluctant to adopt one," but also noted agency failure to introduce evidence in the contested disciplinary hearings supporting the conclusion that the forbidden practice was contrary to the public welfare and morals because it necessarily led to improper conduct), vacating, (1969) 75 Cal.Rptr. 79 (roughly the same conclusion; multiple opinions of interest as early efforts to grapple with underground regulation issue in license revocation context); California Association of Health Facilities v. Kizer (1986) 178 Cal.App.3d 1109, 224 Cal.Rptr. 247 (court issued mandate requiring Department of Health Services to comply with statute which directed the Department to establish a subacute care program in

health facilities and to promulgate regulations to implement the program); Carden v. Board of Registration for Professional Engineers (1985) 174 Cal.App.3d 736, 220 Cal.Rptr. 416 (admission of uncodified guidelines in licensing hearing did not prejudice applicant); City of Santa Barbara v. California Coastal Zone Conservation Commission (1977) 75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361 (rejecting Commission's attempt to enforce as law a rule specifying where permit appeals must be filed --a rule appearing solely on a form not made part of the CCR); Johnston v. Department of Personnel Administration (1987) 191 Cal.App.3d 1218, 1225, 236 Cal.Rptr. 853, 857 (court found that the Department of Personnel Administration's "administrative interpretation" regarding the protest procedure for transfer of civil service employees was not promulgated in substantial compliance with the APA and therefore was not entitled to the usual deference accorded to formal agency interpretation of a statute); National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165 (invalidating internal legal memorandum informally adopting narrow interpretation of statute enforced by DIR); Newland v. Kizer (Cal.App. 4 Dist. 1989) 89 Daily Journal D.A.R. 4932 (mandate is proper remedy to require the Department of Health Services to adopt regulations regarding temporary operation of long-term health care facilities as directed by statute); Pacific Southwest Airlines v. State Board of Equalization (1977) 73 Cal.App.3d 32, 140 Cal.Rptr. 543 (invalidating Board policy that aircraft qualified for statutory common carrier tax exemption only if during first six months after delivery the aircraft was "principally" (i.e., more than 50%) used as a common carrier); Sangster v. California Horse Racing Board (1988) 202 Cal.App.3d 1033, 249 Cal.Rptr. 235 (Board decision to order horse owner to forfeit \$38,000 purse involved application of a rule to a specific set of existing facts, rather than "surreptitious rulemaking"); Wheeler v. State Board of Forestry (1983) 144 Cal.App.3d 522, 192 Cal.Rptr. 693 (overturning Board's decision to revoke license for "gross incompetence in . . . practice" due to lack of proper rule articulating standard by which to measure licensee's competence).

In a recent case, Wightman v. Franchise Tax Board (1988) 202 Cal.App.3d 966, 249 Cal.Rptr. 207, the court found that administrative instructions promulgated by the Department of Social Services, and requirements prescribed by the Franchise Tax Board and in the State Administrative Manual--which implemented the program to intercept state income tax refunds to cover child support obligations and obligations to state agencies--constituted quasi-legislative acts that have the force of law and establish rules governing the matter cov-

ered. We note that the court issued its decision without referring to either:

(1) the watershed case of Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1, which authoritatively clarified the scope of the statutory term "regulation"; or

(2) Government Code section 11347.5.

The Wightman court found that existence of the above noted uncodified rules defeated a "denial of due process" claim. The "underground regulations" dimension of the controversy was neither briefed by the parties nor discussed by the court. [We note that, in an analogous factual situation involving the intercept requirements for federal income tax refunds, the California State Department of Social Services submitted to OAL (OAL file number 88-1208-02) in December 1988, Internal Revenue Service (IRS) Tax Refund Intercept Program regulations. These regulations were approved by OAL and filed with the Secretary of State on January 6, 1989, transforming the ongoing IRS intercept process, procedures and instructions contained in administrative directives into formally adopted departmental regulations.]

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL with a citation to the opinion and, if unpublished, a copy. Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index (see note 33, infra).

See also, the following Opinions of the California Attorney General, which concluded that compliance with the APA was required in the following situations:

Administrative Law, 10 Ops.Cal.Atty.Gen. 243, 246 (1947) (rules of State Board of Education); Workmen's Compensation, 11 Ops.Cal.Atty.Gen. 252 (1948) (form required by Director of Industrial Relations); Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56 (1956) (Department of Industrial Relations rules governing electrical wiring in trailer parks); Los Angeles Metropolitan Transit Authority Act, 32 Ops.Cal.Atty.Gen. 25 (1958) (Department of Industrial Relations's State Conciliation Service rules relating to certification of labor organizations and bargaining units); and Part-time Faculty as Members of Community College Academic Senates, 60 Ops.Cal.Atty.Gen. 174, 176 (1977) (policy of permitting part-time faculty to serve in academic senate despite regulation limiting service to full-teachers). Cf. Administrative Procedure Act, 11 Ops.Cal.Atty.Gen. 87 (1948) (directives applying solely to military forces

subject to jurisdiction of California Adjutant General fall within "internal management" exception); and Administrative Law and Procedure, 10 Ops.Cal.Atty.Gen. 275 (1947) (Fish and Game Commission must comply with both APA and Fish and Game Code, except that where two statutes are "repugnant" to each other and cannot be harmonized, Commission need not comply with minor APA provisions).

- 3 Title 1, California Code of Regulations (CCR), (formerly known as California Administrative Code), section 121, subsection (a) provides:

"'Determination' means a finding by [OAL] as to whether a state agency rule is a regulation, as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the [APA]."
[Emphasis added.]

See Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

- 4 Government Code section 11347.5 provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['regulation'] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a ['regulation'] as defined in subdivision (b) of

Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.
2. Make its determination known to the agency, the Governor, and the Legislature.
3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.
4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.
2. The proceeding began prior to the party's request for the office's determination.
3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a [']regulation['] as defined in subdivision (b) of Section 11342." [Emphasis added to highlight key language.]

5 As we have indicated elsewhere, an OAL determination pursuant to Government Code section 11347.5 is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization

(1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325 (interpretation of statute by agency charged with its enforcement is entitled to great weight). The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5, subdivision (c): "The office shall . . . [m]ake its determination available to . . . the courts." [Emphasis added.]

6 Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments on pending requests for regulatory determination. See Title 1, CCR, sections 124 and 125. The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

No public comments were received concerning this Request for Determination. On April 10, 1989, OAL received a Response to the Request for Determination from the Department of Corrections, which was considered in making this Determination.

7 If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) (emphasis added) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)

8 Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.

9 We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL for the purchase price of \$3.00.

- 10 Penal Code section 5000.
- 11 Enomoto v. Brown (1981) 117 Cal.App.3d 408, 414, 172 Cal.Rptr. 778, 781.
- 12 Penal Code section 5054.
- 13 We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rule-making agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rule-making agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

- 14 Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346, and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a complete discussion of the rationale for the "APA applies to all agencies" principle, see 1989 OAL Determination No. 4 (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.
- 15 See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); see Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.
- 16 California Optometric Association v. Lackner (1976) 60 Cal.App.3d 500, 511, 131 Cal.Rptr. 744, 751.
- 17 Id.
- 18 For instance, Government Code section 11346.7, subdivision (b) requires a "final statement of reasons" for each regulatory action.
- 19 Manuals are intended to supplement CCR provisions. The Preface to Chapter 1, titled "Rules and Regulations of the Director of Corrections" (Title 15, Division 3, of the CCR), states in part:

"Statements of policy contained in the rules and regulations of the director will be considered as regulations. Procedural detail necessary to implement the regulations is not always included in each regulation. Such detail will be found in appropriate departmental procedural manuals and in institution operational plans and procedures." [Emphasis added.]

[This language first appeared in the CCR in May of 1976.]

(California Administrative Notice Register 76, No. 19, May 8, 1976, p. 401.) The Preface, and the quotation, were printed in the CCR in response to the legislative requirement stated in section 3 of Statutes of 1975, chapter 1160, page 2876 (the uncodified statutory language accompanying the 1976 amendment to Penal Code section 5058). As shown by the dates, this language was added to the CCR prior to the decision in Armistead v. State Personnel Board ((1978) 22 Cal.3d 198, 149 Cal.Rptr. 1) and subsequent case law, prior to the creation of OAL, and prior to the enactment of Government Code section 11347.5.]

The Departmental Administrative Manual makes clear in general that local institutions are expected to strictly adhere to the supplementary rules appearing in departmental procedural manuals, and specifically requires that local operations plans are to be consistent with the statewide procedural manuals.

According to section 102(a) of the Administrative Manual:

"[i]t is the policy of the Director of Corrections that all institutions . . . under the jurisdiction of the Department . . . shall . . . observe and follow established departmental goals and procedures as reflected in departmental manuals" [Emphasis added.]

Section 240(c) of the Administrative Manual states:

"While the policies and procedures contained in the procedural manuals are as mandatory as the Rules and Regulations of the Director of Corrections, the directions given in a manual shall avoid use of the words 'rule(s)' or 'regulation(s)' except to refer to the Director's Rules or the rules and regulations of another governmental agency." [Emphasis added.]

20 Stoneham v. Rushen (Stoneham I) (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Stoneham v. Rushen (Stoneham II) (1984) 156 Cal.App.3d 302, 203 Cal.Rptr. 20.

21 Hillery v. Rushen (9th Cir. 1983) 720 F.2d 1132; Faunce v. Denton (1985) 167 Cal.App.3d 191, 213 Cal.Rptr. 122.

22 These adverse decisions concerning regulatory "second tier" material have not been unexpected. The author of the successful 1975 bill rejected an amendment proposed by the Department which would have specifically excluded the statewide procedural manuals from the APA adoption requirement. Later,

a Youth and Adult Correctional Agency bill analysis dated May 5, 1981, unsuccessfully opposed AB 1013, the bill which resulted in the enactment of Government Code section 11347.5. This analysis contained a warning that the proposed legislation "could result in a great part of our [i.e., Department of Corrections'] procedural manuals going under the Administrative Procedure Act process"

- 23 1987 OAL Determination No. 3 (Department of Corrections, March 4, 1987, Docket No. 86-009), California Administrative Notice Register 87, No. 12-Z, March 20, 1987, p. B-74.
- 24 1987 OAL Determination No. 15 (Department of Corrections, November 19, 1987, Docket No. 87-004), California Administrative Notice Register 87, No. 49-Z, December 4, 1987, p. 872 (sections 7810--7817, Administrative Manual); 1988 OAL Determination No. 2 (Department of Corrections, February 23, 1988, Docket No. 87-008), California Regulatory Notice Register 88, No. 10-Z, March 4, 1988, p. 720 (chapters 2900 and 6500, sections 6144, Administrative Manual); 1988 OAL Determination No. 6 (Department of Corrections, April 27, 1988, Docket No. 87-012), California Regulatory Notice Register 88, No. 20-Z, May 13, 1988, p. 1682 (Chapter 7300, Administrative Manual).

Portions of the above noted chapters and sections were found not to be "regulations."

- 25 1988 OAL Determination No. 19 (Department of Corrections, November 18, 1988, Docket No. 87-026), California Regulatory Notice Register 88, No. 49-Z, December 2, 1988, p. 3850 (subsections 1002(b) and (c), and 1053(b) of the Case Records Manual were found to be regulatory; subsections 1002(a) and (d), and 1053(a) were found not to be regulatory). 1989 OAL Determination No. 3 (Department of Corrections, February 21, 1989, Docket No. 88-005), California Regulatory Notice Register 89, No. 9-Z, March 3, 1989, p. 556 (Chapters 100 through 1900, noninclusive, of the Case Records Manual were found to be regulatory except for those sections which were either nonregulatory or were restatements of existing statutes, regulations, or case law).
- 26 These operations plans are authorized in a duly-adopted regulation. Title 15, CCR, section 3380, subsection (c), specifically provides:

"Subject to the approval of the Director of Corrections, wardens, superintendents and parole region administrators will establish such operational plans and procedures as are required by the director for implementation

of regulations and as may otherwise be required for their respective operations. Such procedures will apply only to the inmates, parolees and personnel under the administrator." [Emphasis added.]

Section 242 ("Local Operational Procedures") of the Administrative Manual provides in part:

"Each institution . . . shall operate in accordance with the departmental procedural manuals, and shall develop local policies and procedures consistent with departmental procedures and goals.

"(a) Each institution . . . shall establish local procedures for all major program operations.

". . . .

"(b) Procedures shall be consistent with laws, rules, and departmental administrative policy. . . ." [Emphasis added.]

These sets of rules issued by individual wardens or superintendents are known variously as "local operational procedures," "operations plans," "institutional procedures," and other similar designations. (See Administrative Manual section 242(d).) We simply refer to these documents as "operations plans."

- 27 The Department is currently in the process of reviewing all existing procedural manuals and operations plans, with the objective of (1) transferring all regulatory material from manuals into the CCR, (2) combining all six existing manuals into a single more concise "Operations Manual," and (3) eliminating the duplicative material in the local "operations plans," while retaining in these plans material concerning unique local conditions.
- 28 See Disapproval Decision, Denial of Request for Change Without Regulatory Effect (Tit. 1, CCR, sec. 100), dated May 14, 1987 (OAL File No. 87-0417-02N), California Administrative Notice Register 87, No. 22-Z, May 29, 1987, pp. B-13--B-15.
- 29 California Regulatory Notice Register 89, No. 8-Z, p. 509.
- 30 See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, pp. B-20--B-21, typewritten version, pp. 4-6.

- 31 See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.
- 32 Roth v. Department of Veterans Affairs (1980) 110 Cal. App.3d 622, 127 Cal.Rptr. 552.
- 33 The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:
 - a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)
 - b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)
 - c. Rules that "[establish] or [fix] rates, prices or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)
 - d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
 - e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)
 - f. There is limited authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for

non-statutory exceptions to APA requirements); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Kaaren Morris), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8-473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published every two weeks in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of \$108.

- 34 See Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1; Stoneham v. Rushen (Stoneham I) (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Poschman v. Dumke (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596; 1987 OAL Determination No. 13 (Board of Prison Terms, September 30, 1987, Docket No. 87-002) California Administrative Notice Register 87, No. 42-Z, October 16, 1987, pp. 451-453, typewritten version pp. 7-9.
- 35 Id., Armistead, Stoneham I, and Poschman. See also 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 8, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, p. B-13; typewritten version, p. 6.
- 36 See Poschman, note 34, supra, 31 Cal.App.3d at 943, 107 Cal.Rptr. at 603; and Armistead, note 34, supra, 22 Cal.3d at 203-204, 149 Cal.Rptr. at 3-4. See also 1989 OAL Determination No. 5 (Department of Corrections, Docket No. 88-007), California Regulatory Notice Register, No. 23-Z, April 21, 1989, pp. 1120, 1126-1127; typewritten version, pp. 192-193.

- 37 See Poschman, note 34, supra.
- 38 Id., 31 Cal.App.3d at 943, 107 Cal.Rptr. at 603.
- 39 See Armistead, note 34, supra.
- 40 Id., 22 Cal.3d at 203-204, 149 Cal.Rptr. at 3-4.
- 41 (1981) 123 Cal.App.3d 583, 587-588, 176 Cal.Rptr. 717, 718-719.
- 42 See Stoneham I, note 34, supra, 137 Cal.App.3d at 736, 188 Cal.Rptr. at 135.
- 43 See also Faunce v. Denton (1985) 167 Cal.App.3d 191, 196, 213 Cal.Rptr. 122, 125, in which the Court held that Chapter 4600 of the Department of Corrections' Administrative Manual was a "regulation" and was not a rule of internal management because it "significantly affect[ed] the male prison population in the custody of the department."
- 44 See Poschman, supra, note 34.
- 45 Id., 31 Cal.App.3d at p. 943, 107 Cal.Rptr. at p. 603.
- 46 1988 OAL Determination No. 3 (State Board of Control, March 7, 1988, Docket No. 87-009), California Regulatory Notice Register 88, No. 12-Z, March 18, 1988, pp. 855, 864; typewritten version, p. 10.
- 47 Government Code section 13959.
- 48 1988 OAL Determination No. 6 (Department of Corrections, April 27, 1988, Docket No. 87-012), California Regulatory Notice Register 88, No. 20-Z, May 13, 1988, pp. 1682, 1685; typewritten version, p. 4.
- 49 See Stoneham I, note 34, supra, 137 Cal.App.3d at 736, 188 Cal.Rptr. at 135.

50 1989 OAL Determination No. 5 (Department of Corrections, Docket No. 88-007, April 5, 1989), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, p. 1120.

51 Cf. 1987 OAL Determination No. 3 (Department of Corrections, March 4, 1987, Docket No. 86-009) California Administrative Notice Register 87, No. 12-Z, March 20, 1987, p. B-82; typewritten version p. 11, which identified the following significant public interests involved in the Department of Corrections' "Classification Manual":

"The classification process involves the balancing of two significant public interests: (1) the need to protect the general public, departmental staff and other prisoners from inmates who are prone to violence or likely to escape or both; and (2) the need to control expenditure of public funds by minimizing the number of inmates who are confined in maximum-security, intensive-ly supervised environments." [Emphasis added.]

52 See Kelley v. Johnson (1976) 425 U.S. 238, 96 S.Ct. 1440, 47 L.Ed. 708. In Kelley, the court found that a county police regulation governing hairstyles of the officers was within "the wide latitude accorded the government in the 'dispatch of its own internal affairs [citation; emphasis added].'" (Id., 425 U.S. 238, 246, 96 S.Ct. 1440, 1446.) Furthermore, the grooming regulation was found not to violate any right guaranteed the officers by the Fourteenth Amendment to the United States Constitution.

53 We wish to acknowledge the substantial contribution of Unit Legal Assistant Kaaren Morris and Senior Legal Typist Tande' Montez in the processing of this Request and in the preparation of this Determination.